

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 166 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? YES.
2. To be referred to the Reporter or not? NO.
3. Whether Their Lordships wish to see the fair copy of the judgement? NO.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO.
5. Whether it is to be circulated to the Civil Judge? NO.

STATE OF GUJARAT

Versus

PRAKASHRAV MUKUNDRAY

Appearance:

MR KC SHAH, APP for Petitioner

MR KB ANANDJIWALA for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 11/09/98

ORAL JUDGEMENT

1. The State of Gujarat challenges the judgment and order of Chief Judicial Magistrate, Bhavnagar, passed in Criminal Case No.42/88, on 7-12-89, acquitting the present respondents for the offence punishable under Sections 66 (1) (b), 65 A, 81 and 83 of the Bombay Prohibition Act (to be referred to as " the Act").

2. As per the prosecution case, A.S.P., Bhavnagar, was on patrolling duty on 22-10-87. On that day, around 22-10 hours he checked Navdurga Guest House and found a man and a lady under suspicious circumstances from room No.107. He therefore, called staff of Local Crime Branch (L.C.B.), from Ghogha Gate Police Chowki and got other rooms checked. During the course of the checking, four persons were found in room No.114. They were sitting around the tipoy which was put between the two beds and on that tipoy there was bottle of whisky of Night King brand. The bottle smelt of liquor. Two panchas were therefore summoned and the bottle containing liquor and four glasses were seized. Those four persons were Prakashrao Mukundrao Maskar, Dhirajlal Jivanbhai-Police Constable, Umralla Police Station, Bhavnagar, Natvarlal Jivanbhai-First Grade Head Constable, Veraval, T.F.Veraval and Himatlal Gigabhai Sodhatar, P.S.I., Ankleshwar. Upon smelling their breath, they were all found to be drunk. They had no permit, and therefore, they were arrested at 22-50 hours for the offence under Section 66 (1) (b) and 81 of the Act. The F.I.R. was lodged by A.S.P. Tirthraj, Bhavnagar. On the basis of that information, offence was registered. The persons who were arrested were sent to the Medical Officer for the taking sample of their blood and later on upon receiving the report from F.S.L., Junagadh, charge was filed.

3. Upon the case coming up for hearing before the Chief Judicial Magistrate, Bhavnagar, the accused persons pleaded not guilty to the charge and expressed their desire to face the trial.

4. After considering the evidence on record, the learned Chief Judicial Magistrate, Bhavnagar, came to the conclusion that the prosecution failed to establish the guilt of the accused and acquitted all the four persons of the charge with which they were charged. The State has therefore, preferred the present appeal against the original accused persons who are present respondents.

5. Mr. K.C.Shah, learned Addl. Public Prosecutor appearing for the State has tried to assail the impugned judgment and order on the ground that the learned Magistrate has taken too technical stand as regards conscious possession of the liquor. Mr. Shah urged that when a from a room, four persons are found to be sitting around a tipoy with a half empty bottle of whisky and four glasses smelling of whisky and their breath test also revealing smell of whisky, a necessary and legitimate inference would be that all of them had the

knowledge about the contents of the bottle being liquor and it was their joint conscious possession. Mr. Shah then urged that out of four, at least two persons' blood reports are positive of containing alcohol beyond permissible limit. This aspect is overlooked by the learned Magistrate. The appeal, therefore, may be allowed. The impugned judgment and order may be set aside and the respondents may be convicted of the offence with which they were charged.

6. Mr. Anandjiwala, learned advocate appearing for the respondents submitted that if the record and proceedings of the trial court are perused, it is amply clear that the learned Magistrate has properly evaluated the evidence. There is no mistake committed by the Magistrate in coming to the conclusion that prosecution has not proved the charge against the accused persons beyond reasonable doubt. Mr. Anandjiwala submitted that the complainant A.S.P. Tirthraj has failed to identify the four accused persons as the persons sitting in the room as per the charge. The independent panch witnesses have not supported the prosecution case. Only witness who supports the prosecution case to some extent is P.S.I. Raol. Surprising enough, he was able to identify only accused No.4 and if the F.S.L. report is seen, the alcohol contents of blood of accused No.4 is found to be 0.0276 % which is far below the permissible limit. Mr. Anandjiwala therefore, submitted that no error is committed by the learned Magistrate in acquitting the accused persons and the appeal may therefore be dismissed.

7. While going through the record and proceedings, it is found that witness Jayendrasinh Manubha and witness Bharatsinh Govindsinh, who were the panch witnesses to the incident, they have not supported the prosecution case. As such, very factum of the respondents having been found from room No.114 at the relevant time enjoying a liquor party rolls under a clouds of doubt. The prosecution case is therefore, based on the deposition of the police witnesses. Now police witness A.S.P. Tirthraj who is examined at Exh.35, he speaks of the raid, but in examination in chief itself, he says that he cannot identify and say as to whether the four accused persons are present in the court or not. The outcome of his cross-examination is that he had no information about the offence prior to his getting the room raided and he had no reason to visit the Guest House while he checked the Guest House, he was not able to give reply.

8. The other witness P.S.I. Raol is examined at

Exh.38. He identified only the accused No.4 P.S.I.Sodhatar although it is a fact that accused Nos. 2, and 3 were the members of Bhavnagar Police where this witness was also working. So, this witness seems to be keeping back certain information for whatever reasons. Next witness is P.S.I. Ramlavat. This witness says that all four accused persons who were found from room No.114 were heavily drunk and had no control over their body or mind. But this witness also does not identify any of the accused persons. The result is that the deposition of the police witnesses only identifies accused No.4 and none else. The independent witnesses do not support the prosecution case. Accused No.4 Himatlal Gigabhai Sodhatar was also dead drunk as per say of P.S.I. Ramlavat. As against this, if the blood report of this accused is seen, the alcohol contents were 0.0276 % and as such the version emerging from the deposition of P.S.I. Ramlavat stands falsified.

9. It also transpires that the samples were not sent for investigation/analysis to the F.S.L. expeditiously and the delay that is caused is not explained by the prosecution. It is also worth noting that the prosecution has not examined any witness who collected the blood and there is no evidence whatsoever coming on record to show as to how the muddamal was sealed and sent for investigation. The panch witnesses who have turned hostile are panch witnesses only to panchnama Exh.21 and if that panchnama Exh.21 is seen, it only refers to the arrest of four persons from room No.114 of the Guest House. It is silent about the collection of samples etc. So, there is no evidence on record revealing the details of collection of blood samples, sealing of those samples and sending the same.

10. Under these circumstances, by no stretch of imagination or inference could it be said that the prosecution was able to prove the case against the accused-respondents. As such no error seems to have been committed by the learned Chief Judicial Magistrate, Bhavnagar, while concluding to acquit the respondent by the impugned judgment and order. The appeal is found to be devoid of merits and the same is therefore dismissed.

11-9-98 (A.L.Dave,J.)

(mithabhai)